2007

David Fuller v. Krik Myers, Raylynn Sly, Teresa Sunday, Dennis Sunday, Bernarnhard Mayer, Mayna Fuller : Brief of Appellee

Utah Court of Appeals

David Fuller; Pro Se.
Matthew P. Jube; Rosemond G. Blakelock; Young, Kester & Petro .

IN THE UTAH COURT OF APPEALS

DAVID FULLER, Plaintiff/Appellant, vs. KRIK MYERS, RAYLYNN SLY, TERESA SUNDAY, DENNIS SUNDAY, BERNHARD MAYER and MAYNA FULLER, Defendants/Appellees.	)	Case No.200070032-CA

APPELLEES' BRIEF

APPEAL FROM THE FOURTH JUDICIAL COURT,

UTAH COUNTY, STATE OF UTAH

JUDGE JAMES R. TAYLOR

DAVID FULLER, *Pro se*
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Springville, Utah 84663

Appellant

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IN THE UTAH COURT OF APPEALS

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JURISDICTION OF THE COURT

The Utah Court of Appeals has original appellate jurisdiction in this matter pursuant to the provisions of Utah Code Annotated 78-2a-3(2)(j) (2001 as Amended).

ISSUES PRESENTED FOR REVIEW

In addition to the issues raised by the Appellant, the Appellees present the following for the Court's review.

First, did the Appellant fail to fulfill his duty to marshal the evidence in this case. In order to successfully challenge a lower court's factual findings, the party "must *marshall* [sic] all of the evidence supporting the findings and show that despite the supporting facts, and in light of the conflicting or contradictory evidence, the findings are not supported by substantial evidence." *Grace Drilling Co. v. Bd. of Review of Indus. Comm'n,* 776 P.2d 63, 68 (Utah Ct.App.1989); *accord* Utah R.App. P. 24(a)(9) ("A party challenging a fact finding

must first marshal all record evidence that supports the challenged finding."). The marshaling requirement applies when a party challenges a court's or an agency's factual findings, regardless of the standard of review at issue. See, e.g., *Wilson Supply, Inc. v. Fradan Mfg. Corp.,* 54 P.3d 1177 (Utah 2002) (holding that to correctly dispute the lower court's factual findings as clearly erroneous, "an appellant must first marshal all the evidence in support of the finding and then demonstrate that the evidence is legally insufficient to support the finding even when viewing it in a light most favorable to the court below"); *United Park City Mines Co. v. Stichting Mayflower Mountain Fonds,* 140 P.3d 1200 (Utah 2006) ("[P]arties who ask this court to consider fact-sensitive questions-including those questions reviewed under an abuse of discretion standard-have a duty to marshal all the evidence that formed the basis for the trial court's ruling."). The marshaling requirement requires a party to construct the evidence supporting the adversary's position, and then "ferret out a fatal flaw in the evidence." *West Valley City v. Majestic Inv. Co.,* 818 P.2d 1311, 1315 (Utah 1991). Compliance with this undertaking helps ensure that the factual findings of the agency are overturned only when lacking in substantial evidence. Appellees understand that the marshaling requirement is not a rule of substantive law but rather it is a tool pursuant to which the appellate courts impose on the parties an obligation to assist them in conducting a whole record review. However, parties that fail to marshal the evidence do so at the risk that the reviewing court will decline, in its discretion, to review the trial court's factual findings. *See Chen v. Stewart,* 100 P.3d 1177 (Utah 2004) (explaining that the marshaling

requirement is critical because in its absence the appellate court "must go behind the trial court's factual findings," which often requires a "colossal commitment of time and resources"). Utah R.App. P. 24(b)(k) ("Briefs which are not in compliance *may be* disregarded or stricken, on motion or sua sponte by the court ...." (emphasis added)).

Second, are the Appellees entitled to an award of double costs and attorney fees, pursuant to Rule 33 of the Utah Rules of Appellate Procedure. Under Rule 33(b) of the Utah Rules of Appellate Procedure, a frivolous appeal ". . . is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law." This Court has stated that "when an appeal is frivolous, ... we will award fees regardless of the trial court's ruling on fees."*Burt v. Burt,* 799 P.2d 1166, 1171 (Utah Ct.App.1990). However, "[t]he sanction for filing a frivolous appeal applies only in 'egregious cases' with no 'reasonable legal or factual basis.' " *Cooke v. Cooke,* 22 P.3d 1249 (Utah App. 2001) (citation omitted).

DETERMINATIVE CONSTITUTIONAL PROVISIONS OR STATUTES

Rule 38 of the Utah Rules of Civil Procedure is dispositive of the issue the Appellants raises with regard to his demand for a jury. The Rule provides as follows:

> (a) Right preserved. The right of trial by jury as declared by the constitution or as given by statute shall be preserved to the parties.
>
> (b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by paying the statutory jury fee and serving upon the other parties a

demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party.

© Same: specification of issues. In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party, within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(d) Waiver. The failure of a party to pay the statutory fee, to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

There are no other determinative constitutional provisions, statutes or rules.

STATEMENT OF THE CASE

The Appellant/Plaintiff included two causes of action in his Complaint. ®. 1-11) The first cause of action was for malicious prosecution. The Plaintiff's cause of action centered around the conduct of the Defendant Krik Myers who complained orally and then in a written report to the Utah County Sheriff's office that the Plaintiff, David Fuller, on October 27, 2003, had grabbed him on the right arm with enough force to leave a bruise and cause him

to lose balance. In addition, as Mr. Myers was pulling away, the Plaintiff, David Fuller told him that if her ever entered his (Fuller's) property, he would prosecute. *Id.* As background, the Plaintiff is the father of Jonathan Fuller, who was embroiled in a divorce action with his wife, Mayna Fuller. Mr. David Fuller, the Appellant, was attending multiple court proceedings, in the juvenile and district court, to support his son Jonathan, and to pursue his own independent legal claims for grandparent visitation with the three minor children born to Jonathan and Mayna Fuller. (The Plaintiff David Fuller had actually intervened as a party in the juvenile court action) *Id.*

The alleged confrontation occurred at an order to show cause hearing on October 27, 2003, held in the Fourth Judicial District Court for Utah County. *Id.*

The Plaintiff, in his Complaint alleged that each of the other Defendants, Bernhard Mayer, RayLynn Sly (Mayna Fuller's aunt), Teresa Sunday (Mayna Fuller's mother) and Dennis Sunday (Mayna Fuller's father) had all given statements to police agencies or police officials substantiating some or all of Krik Myers' account. *Id.*

The Plaintiff's Complaint continued, alleging that as a result of the statements of the Defendants, Provo City filed an information charging the Plaintiff, David Fuller, with disorderly conduct, a Class C Misdemeanor, which information was ultimately dismissed. *Id.* The Plaintiff alleged that the Defendants initiated the criminal proceedings against the Plaintiff for an improper purpose. *Id.*

The Defendants, in their Answers, stood by the statements they had made to

government and law enforcement personnel, but denied the remainder of the substantive allegations of Plaintiff's Complaint and specifically denied that they had initiated criminal proceedings against the Plaintiff. ®. 12-14, 15-18, 22-23)

Although the Plaintiff had requested a jury in his Complaint ®. 2), no jury fee was paid when the Complaint was filed on May 19, 2004. On October 1, 2005, the Plaintiff once again demanded a jury and tendered a filing fee of $75.00. ®. 193) The trial court denied the request for a jury trial after oral arguments on November 23, 2005. ®. 213, 216) The Plaintiff filed a renewed request for a jury trial on January 20, 2006. ®. 219-227). The Defendants opposed the motion ®. 228-243) and the Plaintiff submitted a reply memorandum. ®. 235-243). The trial court once again denied the Plaintiff's motion for a jury trial on March 7, 2006. ®. 321)

Plaintiff then file a Petition for Interlocutory Appeal on or about March 15, 2006, which was denied. ®. 324-331).

Judge Taylor conducted a bench trial on March 27, 2006, at the conclusion of which the trial court found that there was no evidence, absent pure speculation by the court, that the parties made their various complaints for any other reason other than justice. Further, the court found that the Plaintiffs had completely failed to provide any evidence of damages other than asking the trial court to speculate. The trial court found the case to be completely without merit and ordered the case dismissed. ®. 352-353) A formal order of dismissal was entered on December 13, 2006. ®. 367, Addendum Exhibit "A") The Notice of Appeal was

filed by the Appellant on January 2, 2007. ®. 374)

STATEMENT OF FACTS

A. Testimony of Sam Banks

At the bench trial conducted by Judge Taylor on March 27, 2006, Sam Banks, a deputy sheriff for the Utah County Sheriff's office testified. (Tr. 30). He testified that on October 27, 2003, he was working security at the front door of the Fourth District Courthouse in Provo, Utah. (Tr. 31) Deputy Banks testified that after the alleged encounter, which he did not witness, he accepted over the next several days, statements made on behalf of both the Plaintiff and the Defendant Myers. (Tr. 36). The deputy then made a brief statement that he attached to the packet, indicating that the matter involved a situation at the courthouse that he did not witness and he submitted it to the Provo City prosecutor's office. *Id.* The deputy testified that he recommended a charge of disorderly conduct. ®. 38)

B. Testimony of Matthew Hilton

Matthew Hilton testified that he was an attorney and in that capacity represented Jonathan Fuller in the divorce case. He testified that he appeared for Mr. Fuller at the hearing, where temporary orders were being considered, on October 27, 2003, the date of the altercation between the Plaintiff Fuller and the Defendant Myers. (Tr. 44-45) Mr. Hilton testified that he was seated at counsel table when the Plaintiff David fuller and his wife entered the courtroom. (Tr. 47)

Mr Hilton testified that he observed the Plaintiff David Fuller approach and talk to the

Defendant Myers, who was seated behind the attorney bar, and tell him that he did not want him to come on his property anymore and that ". . . he [Plaintiff, David Fuller] was in the habit of putting one hand on another when he's making a point. . . . " (Tr. 48, 58) Other than that, Mr. Hilton testified that he did not see any touching or physical contact. (Tr. 49) However, Mr. Hilton testified that the Plaintiff, Mr. Fuller was upset with the Defendant Krik Myers and that Mr. Myers got up and moved away from the Plaintiff. (Tr. 58-60).

C. Testimony of Jonathan Fuller

Jonathan Fuller testified that the Defendant Krik Myers was the person with whom his wife left, when she separated from him and that his wife and the Defendant Myers spend a lot of time together and that Myers appears with his wife at a number of the divorce hearings. (Tr. 71)

Mr. Fuller testified that on October 27, 2003, he saw his father tell Defendant Myers to stay off his property or he would prosecute him for trespassing. He then heard Mr. Myers respond that ". . . this is not the time or place. . . ." After the statement, Mr. Fuller testified that everyone then took their seats. (Tr. 71-72)

Mr. Fuller was recalled by the Plaintiff's counsel and testified that Mr. Myers attended six or seven hearing and that they lasted two or three hours. (Tr. 126) Mr. Fuller also testified that from mid-August to Mid-September, Mayna had used over 2000 minutes talking to Mr. Myers. (Tr. 128-29)

D. Testimony of David Fuller

The Plaintiff David Fuller testified that he was at the courthouse on October 27, 2005 and that as he entered the courtroom, Mr. Myers was seated, he approached him and told him to stay off his property or Mr. Fuller would prosecute him for trespassing. Mr. Fuller testified that the Defendant Mr. Myers raised both arms and told him it was not the time or place. (Tr. 73-75) the Plaintiff testified that the Defendant Krik Myers was his neighbor and that there had been a confrontation with the children of Mr. Myers in the summer of 2003, prior to Mayna Fuller leaving her husband. Mr. Fuller testified that the children had broken into his property. (Tr. 74, 77-78) Mr. Fuller testified that Mayna Fuller worked for him as a secretary and he observed her leave the business and go to Mr. Myers' residence. He testified that he observed her go to lunch with Mr. Myers and leave with him at night. (Tr. 79-80) Mr. Fuller also testified that Mr. Myers was at fourteen or fifteen court proceedings involving the divorce, visitation or custody. (Tr. 82)

E. Testimony of Mayna Fuller

Mayna Fuller was called as a witness by the Plaintiff. (Tr. 90) She testified that she had no relationship with Mr. Myers at the time. In 2003, she testified that her relationship with Mr. Myers was that of a neighbor and a friend . (Tr. 92). She testified that she only went with him to get sprinkler supplies after he had a heart attack. (Tr. 93) Further, she testified that Mr. Myers was married. *Id.*

As to the events of October 27, 2005, she testified that she did not see or hear anything

upon which a statement could be given. She testified that she did not give a statement to anyone regarding the events of the day. (Tr. 96)

Mrs. Fuller testified that a couple of days after October 27, 2005, she went to police complaining that she had been followed by a vehicle from where she picked the children up from daycare until she got to almost to the police station and the police asked her to fill out some paperwork. She described the vehicle as a green or blue older Ford Explorer that had a bug shield on it. Mrs. Fuller denied giving the police any information as to who owned such a vehicle. She testified, in response to questioning that she told the police her in-laws owned a similar vehicle but also reported that she had friends with similar vehicles also. (Tr. 99-100)

Finally Mrs. Fuller testifies that Mr. Myers appeared at the court hearings as moral support. (Tr. 101)

F. Testimony of Ruth Fuller

Ruth Fuller, the wife of the Plaintiff testified that she was actually between Krik Myers and the Plaintiff on October 27 and that she heard her husband, the Plaintiff, tell Mr. Myers to stay off his property or he would prosecute. Otherwise, she testified that she did not see any physical confrontation. (Tr. 108-9). She testified that she saw Mayna and Mr. Myers leave together in a vehicle but never saw any showing of affection. (Tr. 110)

G. Court's Ruling Dismissing the Case Against Mayna Fuller

Based upon the Defendant Mayna Fuller's motion, the trial court dismissed the action

against her on the grounds that no charges were ever filed as a result of input from Mrs. Fuller. (Tr. 118-19)

H. Testimony of Dennis Sunday

Dennis Sunday, the father of Mayna Fuller was called to testify by the Plaintiff. Mr. Sunday testified that Krik Myers did not attend all the divorce and related hearings. He estimated that Mr. Myers attended three. Further, Mr. Sunday testified that he did not give a statement to police regarding the incident of October 27. Instead, he prepared a statement and gave it to Krik Myers. (Tr. 131-32)

I. Testimony of Teresa Sunday

Teresa Sunday, the mother of Mayna Fuller was called to testify by the Plaintiff. Mrs. Sunday testified that he did not give a statement to police regarding the incident of October 27. Instead, he prepared a statement and gave it to Krik Myers. (Tr. 134-35) Mrs. Sunday testified that the confrontation between the Plaintiff and the Defendant, Krik Myers was a verbal and physical confrontation with the Plaintiff, David Fuller, grabbing Mr. Myers' arm. (Tr. 136)

J. Testimony of Raylynn Sly

RayLynn Sly was called by the Plaintiff. She testified that she was Mayna Fuller's aunt. She testified that she attended three court proceedings involving her niece. (Tr. 140-41) She testified that on October 27, she saw the Plaintiff David Fuller dart towards the Defendant Krik Myers. She testified that she saw the Plaintiff grab Mr. Myers' arm and was

yelling at him–telling him to keep his children off his property or he would prosecute. She testified that she heard Mr. Myers reply that it was not the time or place. (Tr. 140-43, 144)

K. Judge Taylor's Ruling and Decision

After the close of the Plaintiff's case, the trial court made the following observations and rulings:

1. From a review of the criminal file, the court noted that an information charging Mr. Fuller with disorderly conduct was filed on December 9, 2003. The same was served and required Mr. Fuller to appear in court on January 2, 2004. On January 26, 2004, the Defendant entered a not guilty plea. A pretrial conference was held on February 26, 2004 at which the matter was set for trial on April 26, 2004. (Tr. 153-54)
2. On April 22, 2004, the Provo City attorney filed a motion to dismiss that stated: "comes now plaintiff by and through its counsel and in the interest of justice requests dismissal of the above case." In the order dismissing the case, it recited the dismissal was for "good cause appearing." (Tr. 154)
3. Counsel for Plaintiff acknowledged that the Plaintiff had put on no evidence of damages and that there was no way that a damage award could be rendered except by sheer speculation. (Tr. 164)
4. Quoting section 653 of the Restatement, the trial court stated: "A

private person who gives to a public official information of another's supposed criminal conduct, of which the official is ignorant, obviously causes the institution of subsequent proceedings as the official may begin on their own initiative. . . But giving the information or even making an accusation of criminal misconduct does not constitute a procurement of the proceedings initiated by the officer if it is left entirely to his discretion to initiate the proceedings or not. When a private person gives to a prosecuting officer information that he believed to be true, and the officer in the exercise of his uncontrolled discretion initiates criminal proceedings based upon that information, the informer is not liable under the rules stated in this section even though the information proves to be false and his belief was one that a reasonable man would not entertain. The exercise of the officer's discretion makes the initiation of the prosecution his own, and protects from liability the person whose information or acquisition has led the officer to initiate proceedings. . . . In order to charge a private person with the responsibility for the initiation of proceedings by a public official it must therefore appear that his desire to have the proceedings initiated expressed by direction, request or pressure of any kind, was the determining factor in the official's decision to commence the

prosecution, or that the information furnished by him which the official acted was known to be false. (Tr. 170-72)

5. Counsel for the Plaintiff acknowledged that it was Deputy Banks who testified that he gathered all the statements from both sides and that it was he who made the recommendation to the Provo City prosecutor to charge Mr. Fuller with disorderly conduct. (Tr. 167)

6. Judge Taylor concluded that the only way that he could find for the Plaintiff is if he engaged in complete speculation:

> There's no evidence from which this court could possibly conclude that these Defendants initiated charges. The charges were disorderly conduct, they were filed by the Provo City Attorney. (Tr. 176)

7. Judge Taylor found that the criminal prosecution was not dismissed on the merits but in the interests of justice. There was no evidence from the Plaintiff as to the reason the prosecution was terminated and certainly the city could re-file the charges. (Tr. 177) Further, the judge found that there was absolutely no proof on damages. (Tr. 178)

SUMMARY OF ARGUMENT

The evidence and law will demonstrate that the right that the Plaintiff had to a jury trial was specifically waived by the failure to file a demand for a jury and pay the jury fee as

required by Rule 38 of the Utah Rules of Procedure. Further, the Plaintiff failed to demonstrate in his subsequent filings regarding a jury, any legal basis upon which the trial court should have acted to rescind its prior ruling denying the Plaintiff's request.

The lower court at no time conditioned the granting of a jury in this matter on the condition that the Plaintiff retain counsel. The argument has no basis in the record of this case.

The trial court acted properly in granting the Defendants' motion to dismiss on the grounds that the Plaintiff had failed to make out a prima facie case of malicious prosecution. The trial court correctly enunciated the elements of the cause of action and summarized accurately the evidentiary record.

Judge Taylor adequately articulated the basis of granting the Defendants' motion to dismiss in the record of this case and signed an appropriate order. The claim of the Appellant that his loss of the jury was because of ineffective assistance of counsel, is a new argument, made for the first time on appeal. Further, ineffective assistance of counsel claims are not generally accepted in these cases.

Finally, the Appellant has violated numerous rules of procedure in compiling the Appellant's brief including the obligation to marshal the evidence and based upon the clear violation of the rules, the brief should be stricken. In that regard, the arguments made by the Appellant are not based in the record of this case and are not submitted in good faith and accordingly, the Appellees should be awarded their costs and attorney fees on appeal.

ARGUMENT

POINT I: THE TRIAL COURT ACTED IN ACCORDANCE WITH RULE 38 IN DENYING THE PLAINTIFF'S REQUEST FOR A JURY.

First, Appellees submit that any issues relating to Judge Taylor's ruling with regard to the Plaintiff's right to a jury trial are moot because the trial court determined, as a matter of law, that the Plaintiff had failed to establish a prima facie case of malicious prosecution. Only if this Court were to determine that the trial court's findings on those issues were clearly erroneous, would issues relating to a jury trial become relevant.

Second, the facts in this case are clear. As established by the court docket, the Complaint was filed in this case on May 19, 2004. The only fee that was paid was the regular filing fee for a civil complaint. No jury fee was tendered to the Clerk of the Court at that time. Thus, the Plaintiff did make a demand for jury but did not pay the fee. A second demand for jury was filed by the Plaintiff on October 11, 2005 (nearly seventeen months after the filing of the Complaint) and, at that time, the Plaintiff paid the jury fee of $75.00. ®. 198) The trial court denied the motion for a jury in its ruling dated November 23, 2005. ®. 213) Without demonstrating any additional facts or circumstances, the Plaintiff filed a renewed motion for a jury trial on June 20, 2005, which was fully briefed by the parties. ®. 221-27, 223-34, 235-32)

In his Ruling dated March 7, 2006, the court, in denying the motion, stated:

> . . . A previous request for jury trial was denied by this Court as not having been timely made. The Plaintiff demanded a jury trial when his complaint was

filed on May 19, 2005. The jury fee was paid to the Court on October 11, 2005. Rule 38, Utah Rules of Civil Procedure, specifies that a demand for jury trial must [be] accompanied by payment of the statutory jury fee and must occur at the commencement of an action or within 10 days after "the service of the last pleading directed to such issue." Failure to make a proper and timely demand, accompanied by payment of the fee is a waiver of the right to trial by jury. In this case the fee was not timely paid. The Plaintiff has made no argument and submitted no information that was not available to the Court when it previously considered this question. The motion is denied.

®. 319-320)

The relevant provisions of Rule 38 of the Utah Rules of Civil Procedure are clear:

a) Right preserved. The right of trial by jury as declared by the constitution or as given by statute shall be preserved to the parties.

(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by paying the statutory jury fee and serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party. . .

(d) Waiver. **The failure of a party to pay the statutory fee, to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. A demand for trial by jury**

made as herein provided may not be withdrawn without the consent of the parties. (Emphasis added)

In *Gasser v. Horne,* 557 P.2d 154, 156 (Utah 1976), the Court resolved a claim of the appellant that it was denied a jury trial. The Court stated: "[w]e quickly dispose of that argument because the [appellants] failed to comply with Rule 38(b). Utah Rules of Civil Procedure, which requires written demand be served upon the opposing party. Likewise, the Court in *Bennion v. Hansen,* 699 P.2d 757 (Utah,1985), held that a party wishing a jury, must comply with the applicable statute or rule. Interpreting a prior version of Rule 38 that required a demand for a jury to be filed ten days before trial, the Court stated:

> The facts with respect to the brothers' first claim are simple. They filed a request for a jury eight days before the trial date. Rule 4.2 of the Rules of Practice in the district courts of this state requires that such a request be made ten days before trial. The trustees objected to the notice, and the law and motion judge sustained the objection. **The brothers argue that this ruling denied them their constitutional right to a jury trial. Their argument is without merit. The Utah Constitution, article I, section 10, provides that in civil cases the right to a jury trial is "waived unless demanded." To avail oneself of this right, one's demand must be timely and in accordance with applicable rule or statute. *Board of Education v. West,* 55 Utah 357, 362-63, 186 P. 114, 116 (1919). Nothing more was required by the court below.** (Emphasis added)

Id. See also, Dyson v. Aviation Office of America, Inc., 593 P.2d 143 (Utah, 1979).

It is respectfully submitted that the Appellant did not meet the strict requirements of Rule 38 by paying the jury fee and filing the demand and clearly, as allowed by the Utah Constitution, the right to a jury trial is waived.

Importantly, the Appellant chose to simply file a new demand for jury and pay the fee when he filed on October 11, 2005. ®. 198) The Plaintiff did not make a motion to the Court to exercise any discretion and did not place the basis for any motion in an affidavit. The mere recital of unsubstantiated and unsupported facts in a new demand for a jury does not call upon the court to exercise any discretion under any particular rule. The Plaintiff was content to submit the issue to the trial court only on the renewed demand without motion, memorandum or sworn statements. Once the trial court ruled on the issue, it was resolved and became the law of the case.

The renewed motion for a jury, filed January 18, 2006, ®. 227) constituted a motion for reconsideration. It was filed out of the permissible time to be considered a Rule 59 or 60 motion filed in response to the trial court's ruling of November 23, 2005. ®. 213). As noted by the Court in *Tschaggeny v. Milbank Ins. Co.,* --- P.3d ----, 2007 WL 1225395 (Utah,2007),

> We begin our analysis by establishing the proper standard of review. Motions to reconsider are not recognized by the Utah Rules of Civil Procedure.*Gillett v. Price,* 2006 UT 24, ¶¶ 5, 7-8, 135 P.3d 861. **Because trial courts are under no obligation to consider motions for reconsideration, any decision to**

> **address or not to address the merits of such a motion is highly discretionary**. (Emphasis added)

Id.

Because the Plaintiff failed to comply with Rule 38 of the Utah Rules of Civil Procedure, his right to a jury trial was waived in accordance with a specific provision of the Utah Constitution. All that the trial court had to have to deny the jury trial to the Plaintiff was the failure of the Plaintiff to timely file a demand and pay the statutory fee. The failure to pay the fee is established by the court's docket. The Plaintiff provided no basis in its new "demand" for the trial court to exercise any discretion. The Plaintiff failed to file any affidavits, memoranda or formal motion addressing the issue. Once the trial court denied the request, the subsequent "renewed" pleadings were motion to reconsider which the trial court was not required even to address. However, as noted by Judge Taylor, the Plaintiff had simply failed to offer any basis that would require a deviation from Rule 38.

POINT II: THE PLAINTIFF'S *PRO SE* STATUS DID NOT AFFECT THE PLAINTIFF'S RIGHT TO A JURY

The Plaintiff, in the preparation of the Appellant's brief, has violated almost every rule relating to the requirements of a brief. The Appellant has failed to cite to the record of the case, failed to separate established facts taken from the record or transcript of this case from the Plaintiff's speculation and otherwise disregarded the Court's requirements for the proper submission of a brief.

In Point II of the Appellant's brief, the Appellant seems to be making the point that a *pro se* litigant may be granted a jury. At no time did Judge Taylor make a ruling that a *pro se* Plaintiff could not have a jury. All of the Court's rulings were based upon the language of Rule 38.

At the hearing held on October 3, 2005, Judge Taylor inquired of the Plaintiff if he felt he was competent to try a case to a jury and asked him if he had seen a jury trial or litigated a case. (October 3, 2005 Tr. at 37, 38) In response, Mr. Fuller indicated that he would have counsel by trial and then Judge Taylor stated:

> You did request a jury in the pleading but he [Mr. Hilton] never paid the filing fee. The law generally is if that fee is not paid within 10 days of when the complaint is filed the right to a jury trial is waived. . . . But I'll tell you what I'll do. In the same time I've given them because they want to file some motions, if you, if you want to look at the law and if you can convince me that you're entitled to a jury under these circumstances–I'll certainly consider it and then give then a chance to brief it as well.

Id. at 38, 39.

Of course, the allegation of the Appellant that the issue of him acting *pro se* was a factor in denying the motion for a jury, is totally unsubstantiated by the Appellant from the record. As clearly demonstrated above, Judge Taylor never made, as a part of his ruling, the fact that the Plaintiff was acting *pro se.* Aside from the inquiries above, Judge Taylor ruled

clearly and explicitly that Rule 38 was dispositive and that the Plaintiff had failed to supply any facts or circumstances that would warrant the exercise of his discretion. Judge Taylor ruled twice on the issue in writing and never was the representation of the Plaintiff mentioned.

POINT III: THE TRIAL COURT DID NOT COMMIT ERROR IN MANAGING THE TRIAL.

Although included in Point 3 of the Appellant's brief discussing the legal requirements of the cause of action plead in the Complaint, the Appellant makes the assertion that judge Taylor committed error in allegedly shortening the trial from two days to one day and thereby allegedly denying the Plaintiff the right to put on additional witnesses. (Appellant's Brief at 19). Again, the Appellant is playing fast and loose with the facts of the case.

The Plaintiff called all the witnesses it had and when the judge asked him to call any additional witnesses, counsel for the Plaintiff indicated that he had a former bailiff, Mandy Jensen under subpoena but that she was unavailable on March 27, the date of trial. Further, counsel indicated that he had an Officer Arochis as a witness. (Tr. 146-147) Judge Taylor responded that he has heard counsel's proffer as to Officer Arochis. Judge Taylor, with the stipulation of defense counsel, was willing to have Mandy Jensen's report entered as an exhibit, in lieu of her testimony. (Tr. 148-150) However, counsel for the Plaintiff refused the offer. Judge Taylor then stated:

> I'm not willing to continue this until tomorrow for one witness, counsel. It's

2:00 in the afternoon, this is the time set for trial

Tr. 150.

Counsel for the Plaintiff then summarized Mandy Jensen's testimony. He indicated that she would testify that she was in the courtroom and that she observed the actions of the parties and would refute the Defendants' accounts. (Tr. 148, 150) Counsel for the Plaintiff proffered that Mandy Jensen would testify that she was standing in close proximity to the parties and that she saw no contact. Further, that when the parties started talking, she moved in close to them. ®. 152) Judge Taylor then, with the Defendants' stipulation, accepted the proffer of the testimony. (Tr. 152)

Accordingly, the Plaintiff was not denied the right to put any evidence before the trial court. With all parties agreeing, the Plaintiff was allowed to proffer the testimony of the two witnesses even though Judge Taylor could have prevented any further testimony based upon the failure of the Plaintiffs to have their witnesses in court in the early afternoon of the first day of trial.

Even more importantly, the court ruled that the details of the dispute between the parties were not relevant to the Plaintiff's cause of action. The Defendants, the court ruled, had a right to provide information to police officers. By so doing, the court ruled, the Defendants did not initiate the criminal proceeding against the Plaintiff. Rather, the Provo City prosecutor, acting on the recommendation of the deputy sheriff, initiated the proceeding.

POINT IV: THE TRIAL COURT DID NOT ERROR IN RULING THAT THE PLAINTIFF HAD FAILED TO ESTABLISH A PRIMA FACIE CASE OF MALICIOUS PROSECUTION.

The Plaintiff was charged with Disorderly Conduct, in violation of U.C.A. 76-9-102(1)(b) (1999 as Amended). The statute states as follows:

> (1) A person is guilty of disorderly conduct if: (a) he refuses to comply with the lawful order of the police to move from a public place, or knowingly creates a hazardous or physically offensive condition, by any act which serves no legitimate purpose; or (b) **intending to cause public inconvenience, annoyance, or alarm, or recklessly creating a risk thereof, he: (I) engages in fighting or in violent, tumultuous, or threatening behavior;** (ii) makes unreasonable noises in a public place; (iii) makes unreasonable noises in a private place which can be heard in a public place; or (iv) obstructs vehicular or pedestrian traffic.
>
> (2) "Public place," for the purpose of this section, means any place to which the public or a substantial group of the public has access and includes but is not limited to streets, highways, and the common areas of schools, hospitals, apartment houses, office buildings, transport facilities, and shops.

The Defendant could have been charged with the crime with or without the physical touching. If the prosecutor and officers believed that Mr. Fuller was acting in a threatening manner, the charge would have been appropriate.

The trial court ruled that the Plaintiff had not made out a prima facie case and found as follows:

1. From a review of the criminal file, the court noted that an information charging Mr. Fuller with disorderly conduct was filed on December 9, 2003. The same was served and required Mr. Fuller to appear in court on January 2, 2004. On January 26, 2004, the Defendant entered a not guilty plea. A pretrial conference was held on February 26, 2004 at which the matter was set for trial on April 26, 2004. (Tr. 153-54)
2. On April 22, 2004, the Provo City attorney filed a motion to dismiss that stated: "comes now plaintiff by and through its counsel and in the interest of justice requests dismissal of the above case." In the order dismissing the case, it recited the dismissal was for "good cause appearing." (Tr. 154)
3. Counsel for Plaintiff acknowledged that the Plaintiff had put on no evidence of damages and that there was no way that a damage award could be rendered except by sheer speculation. (Tr. 164)
4. Quoting section 653 of the Restatement, the trial court stated: "A private person who gives to a public official information of another's supposed criminal conduct, of which the official is ignorant, obviously causes the institution of subsequent proceedings as the official may

begin on their own initiative. . . But giving the information or even making an accusation of criminal misconduct does not constitute a procurement of the proceedings initiated by the officer if it is left entirely to his discretion to initiate the proceedings or not. When a private person gives to a prosecuting officer information that he believed to be true, and the officer in the exercise of his uncontrolled discretion initiates criminal proceedings based upon that information, the informer is not liable under the rules stated in this section even though the information proves to be false and his belief was one that a reasonable man would not entertain. The exercise of the officer's discretion makes the initiation of the prosecution his own, and protects from liability the person whose information or acquisition has led the officer to initiate proceedings. . . . In order to charge a private person with the responsibility for the initiation of proceedings by a public official it must therefore appear that his desire to have the proceedings initiated expressed by direction, request or pressure of any kind, was the determining factor in the official's decision to commence the prosecution, or that the information furnished by him which the official acted was known to be false. (Tr. 170-72)

5. Counsel for the Plaintiff acknowledged that it was Deputy Banks who

testified that he gathered all the statements from both sides and that it was he who made the recommendation to the Provo City prosecutor to charge Mr. Fuller with disorderly conduct. (Tr. 167)

6. Judge Taylor concluded that the only way that he could find for the Plaintiff is if he engaged in complete speculation:

> There's no evidence from which this court could possibly conclude that these Defendants initiated charges. The charges were disorderly conduct, they were filed by the Provo City Attorney. (Tr. 176)

7. Judge Taylor found that the criminal prosecution was not dismissed on the merits but in the interests of justice. There was no evidence from the Plaintiff as to the reason the prosecution was terminated and certainly the city could re-file the charges. (Tr. 177) Further, the judge found that there was absolutely no proof on damages. (Tr. 178)

It is respectfully submitted that Judge Taylor accurately summarized Utah law. A plaintiff must first establish that the defendant instituted or continued a criminal proceeding against the plaintiff in order to successfully maintain a claim for malicious prosecution. *Cline v. Div. of Child and Family Services,* 142 P.3d 127 (Utah App. 2005) (holding where absence of welfare worker or DCFS having instituted a criminal proceeding against father, he could not maintain a claim against welfare worker or DCFS). "In order to successfully maintain a

claim for malicious prosecution, a party must establish four elements...."*Amica Mut. Ins. Co. v. Schettler,* 768 P.2d 950, 959 (Utah Ct.App.1989).

> "(1) A criminal proceeding instituted or continued by the defendant against the plaintiff; (2) termination of the proceeding in favor of the accused; (3) absence of probable cause for the proceeding; [and] (4) 'malice,' or a primary purpose other than that of bringing an offender to justice." *Callioux v. Progressive Ins. Co.,* 745 P.2d 838, 843 (Utah Ct.App.1987) (citing W. Prosser & W. Keeton, *Law of Torts* § 119 (5th ed. 1984)). The failure to establish any one of the four elements is fatal to the cause of action. *Id.*

Id.

The Court has established that to prove that a defendant instituted the criminal proceeding, a plaintiff must show that the defendant was "actively instrumental in putting the law in force." *Callioux,* 745 P.2d at 843 (quoting *Rose v. Whitbeck,* 277 Or. 791, 562 P.2d 188, 190 (1977)). In *Amica,* the fact that the defendants were actively sending the police agencies letters encouraging further action did not detract from the simple conclusion that the decision to file criminal charges was that of the prosecutor.

As announced by the Court in *Gilbert v. Ince,* 981 P.2d 841, 845 (Utah 1999), Utah has adopted the standards of Restatement (Second) of Torts, sections 653-673 to govern malicious prosecution cases. Under that standard, a person who does not initiate proceedings himself may procure the institution of criminal proceedings by inducing a third party to

initiate them. Restatement (Second) of Torts, section 653, comment d (1977). Giving "to a third person, whether public official or private party, information of another's supposed criminal conduct or even accus[ing] the other person of a crime. . . does not constitute a procurement of the proceedings that the third person initiates if it is left to the uncontrolled choice of the third party person to bring the proceeding or not as he may see fit." *Id.*

The prosecutor and not the Defendants in this case initiated criminal proceedings against the Plaintiff. The Defendants simply provided written statements. It was the deputy sheriff who acknowledged getting statements from both sides and then sending the packet to the Provo City prosecutor with a recommendation that the Plaintiff be charged with disorderly conduct. Illustration 2 of Restatement (Second) of Torts, section 653 contains a very similar fact pattern to the case at hand:

> A goes to B, a district attorney, and informs him that C has committed a battery upon A. A believes his statement to be true. The district attorney asks him whether he wishes C to be prosecuted. A says, "I leave that entirely to you." The district attorney files an information against C. A has not procured the institution of the proceedings.

Id. at section 653, illustration 2.

In this case, the Defendants were not even asked by law enforcement or the prosecutors whether they wanted the Plaintiff charged. Everything having to do with the prosecution, after the submission of the statements, was at the sole discretion of the deputy

sheriff and the Provo City prosecutor.

In reviewing the four requirements of a malicious prima facie case, it is submitted that Judge Taylor ruled correctly that the Plaintiffs had failed to establish a case. The Plaintiff failed to prove that the criminal proceeding was instituted or continued by the Defendants against the Plaintiff. Although the Plaintiff proved that the action had been dismissed, the Plaintiff did not prove that the proceedings had been terminated in favor of the Plaintiff. The case was dismissed in the interests of justice and the Plaintiff failed to call anyone from the Provo City Attorney's office to testify that the dismissal was one on the merits of the case. The Plaintiff did no prove a lack of probable cause. As noted by Judge Taylor, the threatening behavior of the Plaintiff, absent physical contact, would be sufficient under the statute to find probable cause. Lastly, there was an absence of malice but even if the Plaintiff could prevail on the malice issue, the cause of action still fails because the absence of any element is fatal to the claim.

POINT V: THE PLAINTIFF'S CASE FAILS BASED UPON THE LACK OF DAMAGES

As set out in the Statement of Facts, there is no question that the Plaintiff failed to put on any evidence of damages. As noted by Judge Taylor, it would require pure speculation to imply that the Plaintiff had suffered any damage. The Plaintiff did not put on any proof of monetary loss or even testimony of non-economic injury such as loss of reputation, etc. There is simply nothing in the record that the Plaintiff could point to that resembles evidence of damage.

The law is clear. Malicious prosecution is a tort. A plaintiff, to recover for the commission of a tort, must demonstrate (1) the standard of care by which the person's conduct is to be measured, (2) proof of a breach of that standard by the tortfeasor, (3) injury that was proximately caused by the tortious conduct, and (4) damages. *Jensen v. IHC Hosps., Inc.,* 82 P.3d 1076 (Utah 2003) (quotations and citations omitted). "A plaintiff's failure to present evidence that, if believed by the trier of fact, would establish any one of the [elements] of the prima facie case justifies a grant of summary judgment to the defendant." *Kent v. Pioneer Valley Hosp.,* 930 P.2d 904, 906 (Utah Ct.App.1997) (alteration in original) (quotations and citation omitted). *See also, Sohm v. Dixie Eye Center,* –P3d —, 2007 WL 2084144 (Utah App. 2007).

The Court in *Tuttle v. Olds,* 155 P.3d 893 (Utah App.2007) stated the test as follows:

> To state a claim for negligence, Plaintiffs must establish four elements: " '(1) that the defendant owed the plaintiff a duty, (2) that the defendant breached that duty, (3) that the breach of duty was the proximate cause of the plaintiff's injury, and (4) that the plaintiff in fact suffered injuries or damages.' " *Webb v. University of Utah,* 125 P.3d 906 (Utah 2005) (quoting *Hunsaker v. State,* 870 P.2d 893, 897 (Utah 1993)).

Id.

Regardless of the tort, whether it be assault, battery, negligence, intentional infliction of emotional distress, abuse of process, malicious prosecution, slander, libel or any other tort,

the claimant or plaintiff must establish injury that is proximately caused by the tortious conduct and must establish damages. The absolute failure of the Plaintiff to establish even a hint of damages is fatal to the claim.

POINT VI: PLAINTIFF WAS NOT ENTITLED TO THE ENTRY OF DEFAULT AGAINST DEFENDANT MYERS

Plaintiff argues that he was entitled to take the default judgment of the Defendant Myers because his Answer was unsigned and he did not appear for trial. (Appellant's Brief at 23). Again, the Plaintiff fails to get his facts right. The Answer of Mr. Myers is in fact signed and filed with the court. ®. 22-23). Further, the Defendant Krik Myers, after filing a *pro se* answer to the Complaint, was represented by counsel throughout the proceeding. ®. 42) The Defendant Myers has appeared and done all that was required of him including responding to burdensome discovery requests of the Plaintiff. The fact that the Defendant was not at trial is simply not a basis to enter a default.

The argument of the Plaintiff, in its entirety mis-states the record and is baseless

POINT VII: ANY CLAIM BASED UPON THE INEFFECTIVENESS OF COUNSEL IN FAILING TO PAY THE JURY FEE WAS NOT RAISED IN THE TRIAL COURT AND IS BASELESS

There is no question that the Plaintiff knew, before trial that his former counsel, Mr. Hilton, had allegedly failed to file the jury fee with the demand in the Complaint. In fact, Mr. Hilton was called by the Plaintiff in the case and was not asked a single question regarding

the failure to pay the jury fee. Further, the apparent mistake of the Plaintiff's former counsel was known well in advance of the renewed motion to allow a jury filed by the Plaintiff. ®. 227) However, the Plaintiff did not raise the claim of ineffective assistance of counsel in its motion, memorandum or reply memorandum. Generally, appellate courts will not review issues raised for the first time on appeal, unless the trial court committed plain error. *See In re E .R.,* 21 P.3d 680 (Utah App. 2001). To preserve an issue for appeal, a party must first raise the issue before the trial court and give the trial court the opportunity to rule on the matter. *See Hart v. Salt Lake County Comm'n,* 945 P.2d 125, 129 (Utah Ct .App.1997). The Plaintiff has not and could not make out a claim of plain error and it is respectfully submitted that this Court should rule that the claim of ineffective assistance of counsel was waived by the failure to preserve the issue.

Secondly, as noted by the Court in *Marchand v. Marchand,* 147 P.3d 538 (Utah App.,2006), the general rule is that in civil cases a new trial will not be granted based upon the incompetence or negligence of one's own trial counsel. There are cases which recognize that under exigent or exceptional circumstances which appear to have resulted in an injustice, the court may be justified in granting a new trial. *Jennings v. Stoker,* 652 P.2d 912, 913 (Utah 1982). Based upon the clear mandate of Rule 38, this is certainly not the case to extend ineffective assistance of counsel cases into matters as trivial as failing to pay a jury fee.

POINT VIII: JUDGE TAYLOR MADE SUFFICIENT FACTUAL FINDINGS

Judge Taylor's extensive oral rulings have been set forth in the Statement of Facts and

in the argument of this case. Judge Taylor's methodical analysis of each of the issues in this case has been set out from the trial transcript. The Utah appellate courts will uphold a trial court's directed verdict or motion to dismiss, when the case is tried to the court, if "reasonable minds would agree that no substantial evidence supported each element of the cause of action." *Brehany v. Nordstrom, Inc.,* 812 P.2d 49, 57 (Utah 1991).

As noted in *D. J. . Investment Group, L.L.C. v. Dae/Westbrook, L.L.C.*, 147 P.3d 414 (Utah 2006), where written findings are required, "[a] trial court need not resolve every conflicting evidentiary issue.... Rather, the trial court's factual findings must be articulated with sufficient detail so that the basis of the ultimate conclusion can be understood. *Consolidation Coal Co. v. Utah Div. of State Lands & Forestry,* 886 P.2d 514, 521 (Utah 1994) (alteration in original) (internal quotation marks and citation omitted). Certainly, Judge Taylor's detailed analysis and findings more than meet the test.

POINT IX: THE PLAINTIFF FAILED TO MARSHAL THE EVIDENCE

There is no question in this matter that the Appellant/Plaintiff is in fact challenging the findings of the trial court. Accordingly, in order to present the argument challenging the lower court's findings and holdings, the party "must *marshall* [sic] all of the evidence supporting the findings and show that despite the supporting facts, and in light of the conflicting or contradictory evidence, the findings are not supported by substantial evidence." *Grace Drilling Co. v. Bd. of Review of Indus. Comm'n,* 776 P.2d 63, 68 (Utah Ct.App.1989); *accord* Utah R.App. P. 24(a)(9) ("A party challenging a fact finding must first marshal all

record evidence that supports the challenged finding."). The marshaling requirement applies when a party challenges a court's or an agency's factual findings, regardless of the standard of review at issue. See, e.g., *Wilson Supply, Inc. v. Fradan Mfg. Corp.,* 54 P.3d 1177 (Utah 2002) (holding that to correctly dispute the lower court's factual findings as clearly erroneous, "an appellant must first marshal all the evidence in support of the finding and then demonstrate that the evidence is legally insufficient to support the finding even when viewing it in a light most favorable to the court below"); *United Park City Mines Co. v. Stichting Mayflower Mountain Fonds,* 140 P.3d 1200 (Utah 2006) ("[P]arties who ask this court to consider fact-sensitive questions-including those questions reviewed under an abuse of discretion standard-have a duty to marshal all the evidence that formed the basis for the trial court's ruling."). The marshaling requirement requires a party to construct the evidence supporting the adversary's position, and then "ferret out a fatal flaw in the evidence." *West Valley City v. Majestic Inv. Co.,* 818 P.2d 1311, 1315 (Utah 1991). Compliance with this undertaking helps ensure that the factual findings of the agency are overturned only when lacking in substantial evidence.

Appellees understand that the marshaling requirement is not a rule of substantive law but rather it is a tool pursuant to which the appellate courts impose on the parties an obligation to assist them in conducting a whole record review. However, parties that fail to marshal the evidence do so at the risk that the reviewing court will decline, in its discretion, to review the trial court's factual findings. *See Chen v. Stewart,* 100 P.3d 1177 (Utah 2004)

(explaining that the marshaling requirement is critical because in its absence the appellate court "must go behind the trial court's factual findings," which often requires a "colossal commitment of time and resources"). Utah R.App. P. 24(b)(k) ("Briefs which are not in compliance *may be* disregarded or stricken, on motion or sua sponte by the court ...." (emphasis added)).

It is submitted that the Plaintiff has failed to comply with many of the rules relating to the presentation on appeal. The Appellant has failed to cite to the record on most occasions and has taken unfair liberties with the transcript and record in this case. It is respectfully submitted that if ever there was a case in which to hold the Appellant to the regular rules of appellate procedure, it is this one. The Appellant has subjected the Defendants to onerous discovery and a trial. Now on appeal, the Appellant argues issues that have no merit or foundation in the record. If the Appellant had marshaled the evidence, as required by this Court, the absurdity of many of the arguments would have been apparent. The Appellees respectfully request that the Court determine that the Appellant has failed in his obligation and thereby deny his appeal on issues related to the facts in this case.

POINT X: APPELLEES SHOULD BE AWARDED THEIR COSTS AND ATTORNEY FEES IN THIS MATTER.

Under Rule 33(b) of the Utah Rules of Appellate Procedure, a frivolous appeal ". . . is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law." This Court has stated that "when an

appeal is frivolous, ... we will award fees regardless of the trial court's ruling on fees."*Burt v. Burt,* 799 P.2d 1166, 1171 (Utah Ct.App.1990). However, "[t]he sanction for filing a frivolous appeal applies only in 'egregious cases' with no 'reasonable legal or factual basis.' " *Cooke v. Cooke,* 22 P.3d 1249 (Utah App. 2001) (citation omitted).

It is respectfully submitted that as to each issue, from the failure of the trial court to allow a jury, to arguing that the trial court denied a jury based upon the *pro se* nature of the Plaintiff's representation, to the elements of malicious prosecution and the findings of the trial court, through the claim of ineffective assistance of counsel and lack of findings, the Appellant has fundamental flaws with each claim that meet the standard of being egregious, without a reasonable factual or legal basis.

Accordingly, Appellees request attorney fees and costs incident to the appeal.

CONCLUSION

It is respectfully submitted that the trial court acted properly in all regards and that the judgment of dismissal of the Plaintiff's action be affirmed and that the Appellees be awarded their costs and fees on appeal.

Dated this 8th day of August, 2007.

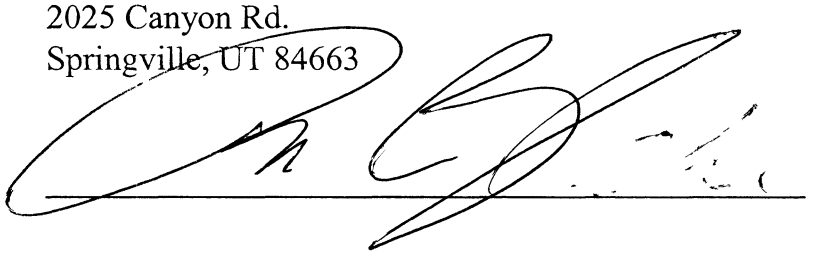
Matthew P. Jube, Esq.
Attorney for Appellees/Defendants

Rosemond G. Blakelock, Esq.
Attorney for Appellees/Defendants

MAILING CERTIFICATE

I certify that 2 copies of the foregoing was mailed, postage prepaid, to the following, on the 8 day of August, 2007.

David Fuller, *Pro se*
2025 Canyon Rd.
Springville, UT 84663



ADDENDUM

Exhibit "A"
Order of Dismissal

FILED
Fourth Judicial District Court
of Utah County, State of Utah

12/13/06 9P Deputy

DAVID FULLER Pro Se.
2025 Canyon Rd
Springville Utah 84663
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IN THE FOURTH JUDICIAL DISTRICT COURT
PROVO DEPARTMENT, COUNTY OF UTAH, STATE OF UTAH

DAVID FULLER Plaintiff, vs. KRIK MYERS et al.. Defendant.	ORDER Case No. 040401694 MI JUDGE: JAMES R. TAYLOR

This case was heard before the court on the 27th March 2006 for a bench trial and the case was dismissed based on the findings that there exists no cause of action ~~on malicious prosecution for one private person against another.~~

ORDER

Based on the findings, the case is ordered dismissed with prejudice. Parties will pay their own costs of litigation.

SO ORDERED

this 13 day of December, 2006

BY THE COURT: _____
JUDGE JAMES R. TAYLOR

agree as to form. _____ _____
Rose Blakelock Matthew Jube

CERTIFICATE OF DELIVERY

I hereby certify that on this 1st day of December, 2006, I placed in the United States Mail Postage Pre-paid, First Class, a copy of the foregoing ORDER/LETTER addressed to the following:

Attorney Rosemond V. Blakelock
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Attorney James L. Driessen (Former Attorney for Plaintiff)
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Signed _____
David Fuller